Supreme Court, U.S.
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No. 06-492

In The
Supreme Court of the United States

CURRY COUNTY; CURRY COUNTY ROAD DEPARTMENT; DAN CRUMLEY, individually and in his official Capacity as Curry County Roadmaster,

Petitioners,

v.

ROBERT DARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether an employee can demonstrate the existence of a genuine issue of material fact in a claim of discriminatory discharge under the Americans with Disabilities Act (ADA), where a municipal body, acting in a judicial capacity, reviews a termination decision made by a subordinate employee, and affirms the termination on grounds that are independent of the subordinate's and nondiscriminatory, and where there is no evidence adduced that the municipal body had any discriminatory motive.

B. Whether an employee who alleges that he was terminated because of his disability in violation of the ADA presents an issue of fact for trial on the issue of whether he could have been reasonably accommodated by his employer, when events demonstrate as a matter of law that no accommodation would have enabled him to perform the essential functions of his job.

C. Whether an employee who alleges that he was terminated because of his disability in violation of the Americans with Disabilities Act (ADA) presents an issue of fact for trial on the issue of whether he could have been reasonably accommodated by his employer through reassignment to vacant jobs, when he offers no evidence as to when any vacant jobs became available, what the jobs were, and whether he could perform the essential functions of any of the jobs.

LIST OF PARTIES TO PROCEEDING, CORPORATE DISCLOSURE STATEMENT

In the proceedings before the Ninth Circuit Court of Appeals, the appellant was Respondent Robert Dark. The Appellees were Curry County, Oregon, and Dan Crumley, the petitioners in the case at bar. Neither petitioner is a non-governmental corporation.

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CITATIONS TO ORDERS/OPINIONS

John P. Cooney, a Magistrate of the United States District Court for the District of Oregon, recommended that the petitioners' motion for summary judgment against the plaintiff-respondent be granted on September 8, 2004. That recommendation was not published, but is electronically available. *Dark v. Curry County*, ___ F. Supp. 2d ___, 2004 WL 2009407 (D. Or. 2004). The recommendation of Magistrate Cooney was adopted by United States District Court Judge Ann Aiken on November 2, 2004. That decision was also not published, but is electronically available. *Dark v. Curry County*, ___ F. Supp. 2d ___, 2004 WL 2468356 (D. Or. 2004). On July 6, 2006, the Ninth Circuit Court of Appeals reversed and remanded for further proceedings. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).

BASIS FOR JURISDICTION

The Court of Appeals entered its judgment on July 6, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12112(a) provides:

> No *covered entity* shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job

training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12111 provides:

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

STATEMENT OF THE CASE

This case arises out of the termination of the plaintiff-respondent, Robert Dark, by Curry County, Oregon, for misconduct during the plaintiff's employment with the County. The following facts were undisputed.

The plaintiff was employed by Defendant Curry County as a maintenance and construction worker, and the essential functions of his position required him to operate and work near graders, dozers, excavators, and other heavy equipment.

The plaintiff has Epilepsy, and has a history of disabling grand mal seizures. Before the plaintiff has a seizure, he always has a warning of the seizure, which he refers to as an "aura."

On January 15, 2002, the plaintiff had an aura in the morning prior to going to work, which forewarned him of a seizure that would happen later that day. Once at work, the plaintiff did not inform any of his coworkers or supervisors that he had had an aura, or that he could or would have a seizure that day. Rather than warning his coworkers of the risk that he could have a seizure, the plaintiff chose to drive a one-ton truck used by the County Road Department while on the job.

The plaintiff then had a seizure, and became unconscious while he was driving the truck. With the plaintiff in the truck was a passenger, Steve Brewer. While the plaintiff was unconscious, Mr. Brewer was able to grab the steering wheel and bring the truck to a stop. But for Mr. Brewer's rapid reaction, the plaintiff or Mr. Brewer could have been seriously injured or killed. The plaintiff admitted in his summary judgment briefing that he used poor judgment and acted negligently in driving the truck, knowing that he had had an aura and that he could have a seizure.

After this incident, Curry County Roadmaster Dan Crumley investigated the incident. He asked the plaintiff to submit to a medical examination to determine whether the plaintiff could safely perform the essential functions of his job. The plaintiff was examined by Dr. John Melson, a neurologist, who concluded that the plaintiff's Epilepsy was poorly controlled, and that the plaintiff should not work around moving machinery, where sudden loss of consciousness would endanger the plaintiff and others around him.

On March 18, 2002, Mr. Crumley advised the plaintiff that he was being placed on administrative leave with pay pending a hearing on April 1, 2002, to determine whether his employment should be terminated. The hearing was held on April 1, 2002, as scheduled. At the hearing, the plaintiff admitted that he had had an aura which alerted him to the fact that he could have a seizure, and that he "used poor judgment" when he chose to drive the truck.

On April 17, 2002, the plaintiff was notified by letter that his employment was terminated. Roadmaster Crumley found that the plaintiff could not perform the essential

functions and duties of his maintenance and construction worker job, and that the plaintiff would pose a direct threat to the safety and lives of his fellow employees and other members of the public if he continued working in his position.

On April 26, 2002, the plaintiff appealed the decision of Mr. Crumley to the Curry County Board of Commissioners. The plaintiff's appeal was heard on May 22, 2002. The plaintiff was allowed to be present with his attorney, Manuel Hernandez. At the request of the plaintiff, the hearing was held in executive session. New evidence, including testimony and exhibits were made part of the Board's hearing, and the record was left open at the request of the plaintiff for several additional days to allow the receipt of additional written materials.

The hearing was reconvened on June 12, 2002, at which time additional testimony was received into evidence and made part of the record. Thereafter, the record was closed.

On June 26, 2002, the Curry County Board of Commissioners affirmed the decision of Roadmaster Crumley on the grounds that the plaintiff had acted:

> irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public in operating a motor vehicle on a public road while on duty and with another employee of the County in the vehicle, knowing that he had a warning of a seizure which would render him unable to operate the motor vehicle.

Importantly, the Board of Commissioners came to the same conclusion as Roadmaster Crumley, but for a

different reason. While Mr. Crumley felt that the plaintiff could not safely perform the essential functions of his job, the Board terminated the plaintiff's employment on the grounds that he engaged in misconduct by acting recklessly and endangering himself, his co-employees, and others.

As previously noted, the plaintiff has admitted that he acted negligently and used poor judgment. There has therefore never been any dispute that the Board's finding that the plaintiff acted irresponsibly was true, as a matter of law. The Board's reason, according to the plaintiff's own admission, was true.

On November 4, 2002, the plaintiff filed a complaint with the Bureau of Labor and Industries for the State of Oregon, alleging that he had been denied reasonable accommodation for his disability and discharged because he was disabled. On February 7, 2003, the complaint was dismissed because "[t]he Division did not find sufficient evidence to continue" the investigation.

On November 25, 2002, the plaintiff filed a complaint with the Equal Employment Opportunity Commission under the Americans with Disabilities Act. On March 11, 2003, the Director dismissed the complaint, after determining that "the evidence obtained during the investigation [did] not establish a violation of the statute."

On June 2, 2003, while working for a building contractor, the plaintiff once again ignored an aura that he experienced in the morning before going to work, and ended up having a seizure on the top of a roof of a house he was working on as a carpenter. Again, the plaintiff did

not inform his employer that he had had the aura and that he could have a seizure while working on the roof.[1]

Plaintiff then brought an action in the United States District Court for the District of Oregon against the defendants, alleging that he had been terminated because of his disability in violation of the ADA and Oregon's state law equivalent, ORS 659A.112.[2] Plaintiff sought damages for past wages, future wages, humiliation, and loss of reputation. Plaintiff also sought punitive damages, attorney fees, and reinstatement. The trial court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

On August 17, 2004, the defendants filed a motion for summary judgment against the plaintiff on all claims. On September 9, 2004, Magistrate Judge John Cooney submitted findings and recommendations to Judge Ann Aiken, in which he recommended that the Defendants' Motion for Summary Judgment be granted. Magistrate Cooney found that the Board's decision constituted a nondiscriminatory reason for discharging the plaintiff, and that the plaintiff had not produced any evidence of pretext by the Board to

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[1] The evidence for this incident was the plaintiff's own deposition testimony. It has never been disputed.

[2] The provisions of Oregon's Discrimination Against Disabled Persons in Employment Act are modeled after the ADA, and contain language which is significantly similar to the ADA. *Wheeler v. Marathon Printing, Inc.*, 157 Or. App. 290, n.6 (1998); *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 895 n.1 (9th Cir. 2001). The provisions of ORS 659.100 *et seq.* "shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended." ORS 659A.139. "The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used under federal law." *Snead v. Metropolitan Property & Casualty Insurance Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001).

demonstrate an issue of fact for trial. Magistrate Cooney also found that the plaintiff's uncontrolled seizures constituted a direct threat to the safety of others which could not be eliminated through reasonable accommodation.

On November 2, 2004, Judge Aiken adopted Judge Cooney's findings and recommendations on similar reasoning, and ordered the action dismissed. Judge Aiken found no evidence that the County's reason for terminating the plaintiff was a pretext for discrimination. Instead, the record demonstrated that the plaintiff "was terminated due to his judgment to drive machinery on the job when he knew he was in danger of experiencing an epileptic seizure; and he did, in fact, have a seizure rendering him unconscious while driving." *Dark v. Curry County*, ___ F. Supp. 2d ___, 2004 WL 2468356 at 1 (D. Or. 2004).

Plaintiff appealed the order granting the Defendants' Motion for Summary Judgment to the Ninth Circuit Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit Court of Appeals reversed and remanded for further proceedings. The basis for the Ninth Circuit's decision is addressed more fully below.

REASONS FOR GRANTING THE WRIT

There were two theories asserted by the County in its Motion for Summary Judgment which are addressed herein. The first was a theory that the plaintiff had engaged in misconduct, and that the plaintiff's misconduct constituted a legitimate, nondiscriminatory ground for his termination. The second theory was that the termination of the plaintiff was lawful as a matter of law,

because it was undisputed that the plaintiff could not perform the essential functions of his job, and that the plaintiff had not presented any evidence that reasonable accommodation was available to him at the time of his termination.[3] The Ninth Circuit Court of Appeals erred in its treatment of both theories, and in a manner whieh conflicted greatly with the law of the other United States Courts of Appeal. The reasons that this Court should grant a writ of certiorari as to each theory are addressed below, beginning with the issue of misconduct.

A. Misconduct.

The first issue that should be addressed by this Court is whether an adjudicative, nondiscriminatory, and final decision made by a municipal employer with regard to a disabled employee's employment should be the relevant decision in analyzing whether an employer has discriminated against a disabled employee, where the employee's employment was originally terminated by a subordinate employee on different grounds. In the case at bar, the specific decision at issue is the Board of Commissioners' decision to terminate the plaintiff for his misconduct in recklessly choosing to drive the truck knowing that he could have a seizure.

There were several reasons that the Court of Appeals rejected the City's misconduct theory in reversing the grant of summary judgment. First, the Court of Appeals

[3] A related theory was that the plaintiff was a direct threat to himself, his coworkers, and members of the public because of his uncontrolled seizures and the fact that his job involved working near heavy machinery.

held that the Board of Commissioners' decision affirming the termination of the plaintiff was irrelevant. The Court of Appeals formed the opinion, without legal authority, that the only relevant decision for the purposes of the ADA was the initial decision of Roadmaster Crumley to terminate the plaintiff's employment.

In other words, it was the Ninth Circuit's opinion that in determining whether a municipality as an employer has discriminated against an employee of the municipality by terminating his employment, the courts must disregard final decisions made by the municipality's highest level decisionmaker, and must focus instead solely on the decision of a subordinate employee of the County which initially resulted in the employee's termination.

This reasoning conflicts with the language and intent of the ADA, as well as principles established by the case law of the federal courts of appeal in interpreting the ADA. First, the language of the ADA itself suggests that the focus should be on the final decision that is the decision of the County itself, rather than upon preliminary decisions or non-final decisions. 42 U.S.C. § 12112(a) provides:

> No *covered entity* shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(Emphasis added). It is a "covered entity" who is prohibited from discriminating against an individual with a disability. Under 42 U.S.C. § 12111(2), a "'covered entity' means an employer, employment agency, labor organization, or joint

labor-management committee." In the case at bar, the "covered entity" is the County, not Dan Crumley. In fact, Mr. Crumley, as a supervisor, cannot be individually liable under the ADA. *Mason v. Stallings*, 82 F.3d 1007 (11th Cir. 1996); *EEOC v. AIC Sec. Inv.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995). Consequently, a common sense reading of the ADA is that only those actions attributable to the County – the "covered entity" – can violate the ADA. A further common sense conclusion is that the final decision of the County's highest level decisionmaker – the Board of Commissioners – would be the action of the "covered entity" to be analyzed under the ADA for indicia of discrimination.

The implication of the Court of Appeals' contrary approach is that municipal bodies have no ability to conduct independent analyses and correct, refine, or even reverse the decisions of subordinate employees, insofar as the ADA is concerned. Under the Ninth Circuit's approach, a municipality is liable for the preliminary actions of a subordinate employee, no matter what it does thereafter through formal adjudicative processes.

This rationale is especially quizzical when compared with other potential circumstances. If the Board had reversed Roadmaster Crumley's decision and reinstated the plaintiff with back pay, would the Court of Appeals then have decided that the Board's decision had meaning under the ADA? If the Court of Appeals acted instead consistently, it would have had to ignore the Board's decision and hold that the plaintiff had been terminated, even though the facts plainly demonstrated that the plaintiff was not effectively terminated; his initial termination having been remedied by reinstatement and an award of back pay. At the very least, the County could not

be liable for future wages, having reinstated the employee. Yet the Ninth Circuit's approach, if applied consistently, would require the courts to ignore the reinstatement by the Board of Commissioners and treat the case as if the employee had never been reinstated; thus, the Ninth Circuit's approach would require an award of future wages to a reinstated employee, if applied consistently. This, of course, would be an absurd result.

Certainly, the rule regarding the effect to be given a final determination of a municipal body should not change depending upon the nature of the Board's decision. The proper rule would instead be to always give relevance and effect to the Board's decision – the final decision of the County – and the only decision that can be said to be the decision of the County itself. If the Ninth Circuit Court of Appeals had done that in the case at bar, it would have had to concede that the Board's decision was nondiscriminatory as a matter of law, and that there was nothing to link any allegedly discriminatory motive of Roadmaster Crumley to the Board of Commissioners' independent decision.

In a Title VII case, the Second Circuit Court of Appeals has rejected the approach of the Ninth Circuit, and has not only considered the final decision of an independent adjudicator relevant; it has also held that an employee cannot show discrimination absent "evidence of causation linking his termination to motives of retaliation or discrimination" by a subordinate employee or decisionmaker. *Collins v. New York City Transit Authority*, 305 F.3d 113, 116 (2d Cir. 2002). Importantly, *Collins* involved both an initial termination decision by the New York City Transit Authority, and a final hearing by an arbitration board affirming the termination. Rather than conclude that the

arbitration board's decision was irrelevant, as the Ninth Circuit would seemingly do, the Second Circuit held that the board's decision precluded the employee's discrimination claim because there was no evidence of discriminatory conduct by the board.

Although *Collins* involved a neutral arbitration board rather than a higher-level municipal body, the reasoning of it should apply as well in the context of the case at bar. There is no evidence whatsoever to suggest any discriminatory motive by any of the Commissioners of the Board. The Board made an independent decision, relying upon an undisputed fact; that the plaintiff used poor judgment and acted recklessly. Certainly, *Collins* is at odds with the Ninth Circuit's approach which would ignore everything but initial decisions made by subordinate employees in employment discrimination cases.

Moreover, other cases demonstrate that the courts do not impose liability under employment discrimination statutes for initial actions of subordinates, absent some evidence that the higher-level decisionmaker was influenced by the subordinate's discriminatory motive. One such area is the "rubber stamp" doctrine, which refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004). To recover under a "rubber stamp" theory, the plaintiff must show "that the decisionmaker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee." *English v. Colo. Dep't of Corrs.*, 248 F.3d 1002, 1011 (10th Cir. 2001). Of course, the Courts have logically *not* imposed liability where the decisionmaker conducted

an independent investigation of the facts, rather than relying entirely on the recommendation of the biased subordinate. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231-32 (10th Cir. 2000) (finding it "[i]mportant[ ]" that "in the course of his investigation" the decisionmaker asked the employee "to give his version of the exchange," but the employee declined to do so); *English*, 248 F.3d at 1011 (noting that the decisionmaker met twice with the employee and his attorney, and specifically asked for evidence rebutting or mitigating the findings of the allegedly biased subordinates).

The issue in the case at bar is similar, except that there are two decisionmakers, rather than one at issue. There is no dispute that the County made an independent decision based upon the receipt of evidence, including testimony and exhibits, and that it held two separate evidentiary hearings. Plaintiff was given a full opportunity to present evidence, and his requests to supplement the record were granted. There has never been any evidence to suggest that the Board's decision was in anyway tainted or lacking independence. There has never been any direct or indirect evidence of a discriminatory motive by the Board. There has also never been any evidence that the Board's decision was a pretense.

Thus, relying upon the same principles that support the "rubber stamp" doctrine, there was no basis for the Court of Appeals to conclude that the Board discriminated against the plaintiff. The Court of Appeals' disregard of the Board's decision must be overruled. It is important for this Court to uphold the authority of local governments to make final decisions with regard to their employees, and to give legal effect to those decisions, rather than disregarding

them in favor of initial decisions made by a subordinate employee.

Furthermore, state law supports the proposition that the decision of the Board of Commissioners is the only decision which can be said to be the decision of the County, and which has legal significance. The state law remedy for the plaintiff to appeal his termination is a writ of review under ORS 34.010, *et seq.*, which provides the exclusive method of obtaining judicial review of a decision of a County Board of Commissioners. ORS 34.010-34.030; *Shipp v. County of Multnomah*, 891 P.2d 1345 (Or. 1995). The petitioner in a writ of review proceeding must bring the petition "within 60 days from the date of the decision or determination sought to be reviewed." ORS 34.030.

Thus, if the plaintiff had wished to challenge his termination, his exclusive remedy would have been a writ of review of the Board of Commissioners' decision. Plaintiff's failure to seek a writ of review now precludes him from bringing any action contesting the Board of Commissioners' decision. *Shipp*, 891 P.2d at 590.

Importantly, the plaintiff would have been barred from seeking a writ of review of the decision of Roadmaster Crumley. If he had done so, the writ would have been quashed on the basis that the plaintiff failed to exhaust his remedies with the County by failing to appeal to the Board of Commissioners. *Miller v. Schrunk*, 232 Or. 383, 375 P.2d 823, 826 (Or. 1962). Furthermore, under state law, the Board's adjudicative administrative decision must be given issue preclusive effect in subsequent proceedings. *North Clackamas School Dist. v. White*, 750 P.2d 485 (Or. 1988). Thus, as a matter of state law, the plaintiff cannot

relitigate the fact that he was terminated for misconduct, and for no other reason.

In other words, as a matter of state law, the only decision that has legal significance, and the only decision of the County that the plaintiff could appeal, would be the decision of the Board of Commissioners. The reasons set forth in the Board's decision are, as a matter of state law, the only reasons attributable to the County.

Because employment relationships are defined by state law, and because the law of the State of Oregon defines the relevant "termination" to be that of the Board of Commissioners, it is only rational to consider the relevant adverse action under ADA to be the Board's decision, rather than the decision of Roadmaster Crumley.

The Ninth Circuit's disregard of the Board of Commissioners' decision was error. If the Court of Appeals had properly given credit to the Board's rationale of misconduct, it could have only come to one conclusion on the facts before it – that there was no evidence of pretext, and that the Board's decision was nondiscriminatory as a matter of law.

The petitioners request the issuance of the writ of certiorari to review the Court of Appeals' decision and seek a ruling that the federal courts are required to review the final decision of a municipal body for evidence of discrimination in determining whether a municipality has discriminated against an employee by terminating his employment.

B. Reasonable Accommodation.

The issue of reasonable accommodation in this case begins with the broadly acknowledged proposition that it is the burden of the employee at the summary judgment phase to produce evidence showing that the employer denied the employee a reasonable accommodation which existed at the time of the employee's termination. *Jackan v. New York State Dept. of Labor*, 205 F.3d 562 (2d Cir. 2000); *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595 (7th Cir. 1999); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 n.27 (D.C. Cir. 1998) (en banc); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997). Thus, the question properly before the Court of Appeals was whether the plaintiff had produced evidence that a reasonable accommodation existed, of which the plaintiff was denied.

The Court of Appeals did not take issue with the conclusion that, at the time of the plaintiff's termination, he could not have performed the essential functions of his job *without* accommodation. *Dark*, 451 F.3d 1078 at 1087-88. However, the Court of Appeals did hold that an issue of fact existed as to whether the County could have accommodated the plaintiff in two respects – first, by allowing the plaintiff to take medical leave to try new medications, and second, by offering the plaintiff other jobs with the County.[4] The Court of Appeals' reasonable accommodation

[4] Plaintiff was in fact given another position by the County after his termination, but this fact was not made part of the summary judgment record. It is the plaintiff's burden to show that reasonable accommodation was available, and it is the position of the petitioners that the plaintiff failed to make any such showing to survive summary judgment. If this case does proceed to trial, the defendants will prove

(Continued on following page)

analysis contrasts starkly with the law of the other Circuits regarding the plaintiff's burden of showing the availability of a reasonable accommodation in order to survive a motion for summary judgment. The Court's analysis with respect to both reasonable accommodation issues is discussed more fully below.

1. Medical Leave – Events Which Demonstrate the Futility of Medical Leave.

The Court of Appeals first held that the plaintiff presented an issue of fact as to whether his disability could have been accommodated by the use of medical leave.

> In *Nunes*, we held that "[u]npaid medical leave may be a reasonable accommodation under the ADA. . . . Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." [Citations omitted.]
>
> Although recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and cannot state when and under what conditions he could return to work at all), *see Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106 (10th Cir. 1999), the County *was obligated to consider this option* under the particular circumstances of Dark's case. As such, there remains a

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that the plaintiff was in fact reasonably accommodated by the County. Although the plaintiff will contest the reasonableness of the County's accommodation, the County asserted at summary judgment, on appeal, and herein, that the plaintiff has failed to produce evidence that there was any reasonable accommodation available to the plaintiff.

> genuine issue of material fact as to whether Dark could reasonably have been accommodated by his request for leave sufficient to permit his transition to new medication.

Dark, 451 F.3d at 1090. Thus, the Court of Appeals' focus was clearly on its belief that the County had not "responded" to the plaintiff's request for medical leave. The essence of the Court's ruling was simply that the plaintiff had requested medical leave to try new medication and try to control his seizures, and that the County had not granted the requested medical leave. The Court opined that this was sufficient to show an issue of fact as to whether the County failed to reasonably accommodate the plaintiff's disability.

In so holding, the Court of Appeals disregarded evidence which, without dispute, demonstrated that medical leave would not have accommodated the plaintiff, because it would not have enabled him to perform the essential functions of his job. Specifically, the Court of Appeals ignored the fact that, even after the plaintiff's termination, he was subsequently employed and had a second seizure on the job while working on a roof. This occurred on June 2, 2003, more than one year after the plaintiff's employment with the County was terminated. The incident bore all the indicia of recklessness that the previous incident had. The plaintiff had an aura, but once again ignored that aura. Afterward, he had a seizure on the roof. The evidence of this incident was absolutely undisputed, and based upon the plaintiff's own deposition testimony.

The plaintiff wanted medical leave ostensibly for the purpose of having his "seizure issue resolved." The evidence of the plaintiff's on-the-job seizure at his subsequent

employer establishes as a matter of law, that more than one year of medical leave would not have "resolved" the plaintiff's "seizure issue."

The Court of Appeals ignored this evidence. The only explanation for the Court of Appeals' opinion is that the Court found the alleged failure of the County to respond to the plaintiff's request for medical leave sufficient to establish an issue of fact as to whether the County could have reasonably accommodated the plaintiff, even though the evidence demonstrated without dispute that the requested medical leave would *not* have enabled the plaintiff to perform the essential functions of his job.

This presents an important question for this Court; namely, whether events which demonstrate the futility of a proposed accommodation defeat any claim under the ADA, and entitle the employer to summary judgment.

The Ninth Circuit Court of Appeals' decision is in contrast with the law of the other circuits. For instance, the First Circuit Court of Appeals has stated that a plaintiff must make a showing "that the accommodation 'would effectively enable [him] to perform [his] job.'" *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001); *see also*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 654-55 (1st Cir. 2000) (O'Toole, J., dissenting) ("The leave extension requested by the plaintiff was not a reasonable accommodation as a matter of law because it was not an accommodation at all as that term ought to be understood. To be an accommodation, the requested leave would have to do what an accommodation under the ADA must do – enable the employee to perform the essential functions of her job. To put it in the terms of the EEOC's

proposed definition of 'reasonable accommodation,' Garcia's requested leave would not have been 'effective.' ").

The Eighth and Third Circuits have adopted a test for reasonable accommodation which requires the employee to prove, among other things, that the "employee could have been reasonably accommodated *but for* the employer's lack of good faith" in the interactive process. *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999) (emphasis added); *Taylor v. Phoenixville School District*, 174 F.3d 142, 165 (3d Cir. 1999).

This "but for" test makes intuitive sense in the context of the ADA. Even if an employer fails to act in good faith in the interactive process with the employee, it makes no sense to award an employee damages, including lost past and future wages, when the evidence demonstrates without dispute that the plaintiff could not perform the essential functions of his job even with the requested accommodation. Certainly, the ADA does not require a County to retain an employee who continues to behave irresponsibly, simply because it allegedly failed to offer a requested accommodation which has since proven futile.

The Court of Appeals should have affirmed summary judgment on the plaintiff's ADA claim, because there is no dispute that he could not have been reasonably accommodated. This Court should grant a writ of certiorari to clarify the law of reasonable accommodation to establish that evidence showing the futility of a requested accommodation defeats any claim by the plaintiff that he was discriminated against in violation of the ADA by an employer's refusal to provide the requested accommodation.

2. Reassignment – Extent of the Plaintiff's Burden to Show the Availability of Other Positions for Which He Was Qualified.

In addition to sick leave, the plaintiff argued in his summary judgment response and on appeal that he could have been reassigned to another vacant position. The only evidence of other positions to which the plaintiff contends he could have been reassigned was an affidavit submitted by the plaintiff, in which he listed several positions with the County that he stated had become available "since [his] termination."[5] His affidavit was dated September 6, 2004. Thus, the positions could have become available at any time between the termination letter of April 17, 2002, and the plaintiff's affidavit dated September 6, 2004 – a period of more than two years. No other evidence of vacant positions was adduced. Further, the plaintiff introduced no evidence of the qualifications required for the positions, nor any evidence that he was qualified for any of the positions. No evidence was adduced that any of the positions became vacant at or near the time of the plaintiff's termination.

The Court of Appeals held that the plaintiff's affidavit was sufficient to establish an issue of fact as to whether the plaintiff could have been reasonably accommodated by reassignment to one of the vacant positions listed in his affidavit. In this respect, the Ninth Circuit Court of Appeals is also at odds with the law of the other Courts of Appeal, which have held that it is the plaintiff's burden to prove "that a vacant position exists and that the plaintiff

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[5] The listed jobs included "weed control, flagging, clerical, mechanic, data entry, reception, surveyor assistant, building maintenance, [and] sign making[.]"

is qualified for that position." *Jackan v. New York State Dept. of Labor*, 205 F.3d 562 (2d Cir. 2000); *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595 (7th Cir. 1999); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 n.27 (D.C. Cir. 1998) (en banc); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997).

Other Circuits have specifically granted motions for summary judgment where the employee failed to produce evidence showing the availability of a position at the time of his termination of which he was qualified. *Ozlowski v. Henderson*, 237 F.3d 837, 840 (7th Cir. 2001) (affirming summary judgment in favor of employer where the employee "[did] not provide any evidence of his qualifications in comparison to the legitimate prerequisites of any of the positions he identified or any evidence that such positions were vacant, other than his own conclusory statements"); *Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 567 (2d Cir. 2000) (affirming summary judgment in favor of employer where the employee failed to produce evidence that "a vacancy existed into which [he] might have been transferred pursuant to then-existing civil service rules whose duties he could have performed").

Further, the Tenth Circuit Court of Appeals has stated the rule that an employer is not required to place an employee on leave indefinitely until a position becomes vacant for which the employee is qualified. *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001) (holding that an employer was not required to retain an employee for six months until a new position became vacant).

The reasons that other Circuits have placed the burden on the employee at the summary judgment phase of showing actual jobs that the plaintiff could perform were discussed in *Jackan*, *supra*, and are grounded in the interpretation of the text of the ADA itself:

> Our reading of *Borkowski* places the burden of establishing that a vacancy exists on the plaintiff-employee. When a plaintiff brings an action alleging that a defendant violated the ADA by failing to offer a reasonable accommodation, the claim fails unless the plaintiff establishes that "an effective accommodation exist[ed] that would render her otherwise qualified." *Id.* at 139. The burden of persuasion on the "existence" of an "effective accommodation" is not satisfied by mere speculation. For example, an employee with a severe motor disorder could not successfully carry her burden of persuasion by asserting that she would have been qualified to perform the duties of her position with the assistance of a mechanical device that compensates for her disorder. She would need to demonstrate that such a device existed and was available to her employer. (The employer would then bear the burden of proving that the machine was impractical, unreasonably expensive, unsuitable, or otherwise not a reasonable accommodation.) Similarly, a plaintiff seeking to hold the employer liable for failing to transfer her to a vacant position as a reasonable accommodation must demonstrate that there was a vacant position into which she might have been transferred.

Jackan, 205 F.3d at 566-67. Thus, other Circuits have held that the burden under the ADA is not simply to show that vacant positions existed, but to show as well that the plaintiff was qualified for those positions, and that the

positions existed at the time of the plaintiff's termination. This approach is consistent with the ADA, and the Ninth Circuit Court of Appeals' rule which allows an employee to proceed to trial on an affidavit which lists only positions that opened with an employer in a two-year period, without any evidence of qualification, should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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451 F.3d 1078

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT DARK,

Plaintiff-Appellant,

v.

CURRY COUNTY; CURRY COUNTY ROAD DEPARTMENT; DAN CRUMLEY, individually and in his official capacity as Curry County Roadmaster,

Defendants-Appellees.

No. 04-36087

D.C. No. CV-03-03041-JPC/ALA

OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
December 6, 2005 – Portland, Oregon

Filed July 6, 2006

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain, Circuit Judges, and Larry A. Burns,* District Judge.

Opinion by Judge O'Scannlain

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* The Honorable Larry A. Burns, District Judge for the Southern District of California, sitting by designation.

COUNSEL

Manuel C. Hernandez, Hernandez and Associates, LLC, Bandon, Oregon, argued the cause for the appellant and was on the briefs.

Jason M. Montgomery, Law Office of Robert E. Franz, Jr., Springfield, Oregon, argued the cause for the appellee and was on the brief. Robert E. Franz, Jr. was also on the brief.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to review a summary judgment dismissal of a claim by an epileptic heavy-equipment operator for a county road department under the Americans with Disabilities Act.

I

From the age of 16, Robert Dark has suffered from epilepsy. He controls the condition with medication but still endures the occasional seizure which is usually preceded by a physical manifestation called an "aura." An aura is "akin to a nervous jerk"; it indicates "the potential for a seizure on the day of the aura," typically no sooner than one hour later. Dark says that a seizure follows an aura approximately half of the time.

Dark's employment with the Road Department of Curry County, Oregon ("the County") commenced on March 4, 1985. His position, "Maintenance and Construction Worker III," required, among other tasks, the operation of heavy equipment such as construction vehicles.

Dark's employment record over approximately 16 years reflects satisfactory, at least, job performance.

On the morning of January 15, 2002, prior to his leaving for work, Dark experienced an aura. Despite this warning, Dark reported for work as scheduled and failed to inform anyone of the possibility of his suffering an epileptic seizure. Later that day, Dark suffered a seizure and fell unconscious while driving a County pickup truck. Fortunately, at the time Dark was operating the vehicle at a very slow rate of speed. His passenger, another Road Department employee, gained control of the vehicle and brought it to a safe halt.

In response to this incident, the County requested that Dark undergo a medical examination. Dr. John Melson, M.D., a neurologist, performed the examination on March 11, 2002 and concluded that "because of the presence of poorly controlled idiopathic epilepsy, [Dark] should not work in high places, he should not work around moving machinery where sudden loss of consciousness would endanger either himself or others, and this would appear to severely limit him from the duties of the job described."

Subsequent to receipt of Dr. Melson's report, the Road Department placed Dark on administrative leave. During this process, Dark's commercial driver's license was also suspended. On April 1, 2002, the Road Department held a disciplinary hearing at which Dark was represented by counsel. Dark admitted to having experienced an aura on the morning of the incident.

The Road Department terminated Dark's employment on April 17, 2002. It communicated its decision in a three-page letter signed by Daniel P. Crumley, the department's

Roadmaster, which concluded that Dark could not perform the essential functions and duties of his position and that his continued employment posed a threat to the safety of others.

Dark appealed these findings to the Curry County Board of Commissioners ("the Board") and received a hearing on May 22, 2002. On June 26, 2002, the Board affirmed Crumley's decision to terminate Dark's employment. It reasoned that Dark had "acted irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public."

On November 25, 2002, Dark filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Following an investigation, the EEOC determined that the evidence "does not establish a violation of the Americans with Disabilities Act [("ADA")]." *See* 42 U.S.C. § 12101 *et seq.* On March 11, 2003, it declined to sue the County on Dark's behalf but permitted him 90 days within which to initiate a private action.

Thereafter, on May 5, 2003, Dark filed this lawsuit in the District of Oregon. He sued Curry County, the Road Department, and Crumley under the ADA and Oregon's state-law equivalent. *See* OR. REV. STAT. § 659A.100 *et seq.*[1] Dark's first claim for relief alleged that the County violated the ADA by discharging him while refusing reasonably to accommodate his disability; his second claim alleged a similar violation of the Oregon statute. Dark

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[1] "The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used under federal law." *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001), *cert. denied*, 534 U.S. 888 (2001).

seeks recovery of lost wages, future wages, humiliation, and loss of reputation, as well as punitive damages, reinstatement, and attorneys' fees.

The County filed a motion for summary judgment on August 16, 2004. The magistrate judge charged with making a recommendation did not receive a response from Dark because of an alleged postal error. On September 9, 2004, the magistrate judge recommended granting the County's motion. The district court considered the magistrate's recommendation and Dark's subsequently filed Memorandum in Opposition to Defendants' Motion for Summary Judgment and supporting affidavits. On November 2, 2004, the court adopted the magistrate's recommendation and granted the County's motion for summary judgment and dismissed Dark's lawsuit.

Dark timely appealed.

II

Dark urges that summary judgment was improperly granted because there are at least three genuine issues of material fact which entitle him to a jury trial, specifically, with respect to (1) the reason given for his termination, (2) his qualifications, and (3) whether he is a "direct threat" to his fellow employees.[2]

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[2] We review de novo the district court's grant of a motion for summary judgment. *Snead,* 237 F.3d at 1087. We view the evidence in the light most favorable to the nonmoving party and then determine whether there remains a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see Nunes v. Wal-Mart Stores, Inc.,* 164 F.3d 1243, 1246 (9th Cir. 1999).

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A

Dark first contends that there is a genuine issue of material fact as to whether the County demonstrated a legitimate, nondiscriminatory reason for his termination. The County responds that "[t]here is no dispute that the plaintiff did engage in misconduct by driving with knowledge of the risk he posed, and without warning any coworkers of the danger he presented." Thus, the County argues that Dark's termination resulted from misconduct or a failure to meet legitimate job expectations.

The party moving for summary judgment must only allege that there is an absence of evidence by which the nonmoving party can prove his case. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). The nonmoving party may not rest upon the mere allegations or denials in the pleadings. *See* FED. R. CIV. P. 56(e). Still, "[t]he burden on the nonmoving party is not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, Civil 3d § 2727 (1998).

On a contested factual issue, "[i]f the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial." *Atlantic Richfield Co.*, 51 F.3d at 1435 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Conversely, summary judgment is inappropriate where there are genuine factual issues that may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

In this case, the County can prevail only if it can show that no reasonable jury would infer from Dark's evidence that he has stated a valid claim under the ADA.

1

The County alleged in its motion for summary judgement that there are no disputed facts with respect to the reason for Dark's termination. But we find some difficulty with this assertion because the record includes two divergent explanations.

The first explanation for Dark's termination is the letter of April 17, 2002, in which Crumley explained his decision in terms of Dark's alleged lack of fitness to perform the duties of the position. In relevant part, the letter stated:

> The allegation that *you cannot perform the essential functions and duties of the job* of Maintenance and Construction Worker III as described is substantiated. . . .
>
> . . . .
>
> Following your on the job seizure on 1/15/02, the County had sufficient concerns *regarding your medical condition* to request an independent Neurologist to evaluate you. . . .
>
> . . . .
>
> . . . I accept Dr. Melson's findings that *because of the presence of poorly controlled idiopathic epilepsy,* you should not work around moving machinery. . . . That would prevent you from performing the basic work functions outlined in your job description.
>
> . . . .
>
> . . . I believe a "seizure free" condition is critical for workers in your occupation. . . . *[Y]our condition in my opinion prevents you from performing*

> *your duties*. . . . It is also my conclusion that allowing you to work in your present job for Curry County would impose a threat to the safety and lives of your coworkers and the public.

(Emphases added.) True, the letter also details aspects of the January 15, 2002, incident. But nowhere does Crumley state that Dark's driving the pickup truck despite the aura was an independent reason for the termination.

The second explanation, "misconduct," is contained in the Board's order of June 26, 2002. After reciting the relevant facts, the Board reasoned:

> By operating the truck and heavy equipment on January 15, 2002, Mr. Dark knowingly put the safety of himself, co-workers and the general public in jeopardy.
>
> Now, therefore, it is hereby ordered that Dan Crumley's decision to terminate the employment of Robert Dark is hereby affirmed for the reason that on January 15, 2002, Robert Dark acted irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public. . . .

The County, in effect, asserts that the Board's rationale was the only legally relevant reason for Dark's termination.

The County, however, provides no explanation as to why we should accept such contention. To the contrary, we think that the role of the Board was simply to entertain the appeal of an already-completed termination. As noted in the Board's order affirming the termination, "[p]ursuant to the Curry County Personnel rules, the Board's mandate was to 'deliberate and reach a decision to affirm, modify or

deny the disciplinary action.'" The termination letter also considered Dark's firing to have been a completed act. Regarding Dark's appeal to the Board, the letter stated, "The appeal must be in writing. . . . It must also specify why you believe the dismissal *was* not in good faith, for cause or *was* in error." (Emphases added.) And at oral argument, counsel for the County conceded that the effective date of Dark's termination was April 17, 2002, the date of Crumley's termination letter. Thus, the legally relevant action had already been accomplished before the Board took cognizance of Dark's appeal.

2

Of course, even were we to treat the Board's decision as the legally operative one, the reason given for Dark's termination must actually constitute a valid nondiscriminatory explanation, *i.e.,* one that "disclaims any reliance on the employee's disability in having taken the employment action." *Snead,* 237 F.3d at 1093.

While courts have indeed "recognized a distinction between termination of employment because of misconduct and termination of employment because of a disability," *Collings v. Longview Fibre Co.,* 63 F.3d 828, 832 (9th Cir. 1995) (citation omitted), there is an important caveat. "[W]ith few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1139-40 (9th Cir. 2001).[3] The

[3] One of those exceptions is the ADA's explicit authorization for discharge on the basis of alcoholism and illegal drug use, 42 U.S.C. § 12114(c)(4), and the *Humphrey* court, in fact, distinguished *Collings*

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County does not argue that Dark's "misconduct" resulted from other than his disability.[4] Thus, the Board's explanation, as a matter of law, fails to qualify as a legitimate, nondiscriminatory explanation for Dark's discharge.

3

Even if the Board's explanation were legitimate and nondiscriminatory, we must still must consider it in light of the ADA's standard of causation.

As noted, the County urges us to credit only the rationale provided by the Board of Commissioners, which was that the Road Department terminated Dark because of his "misconduct." But the ADA does not require that a discriminatory impetus have been the *only* motive for an adverse employment action. *See Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005); *Baird ex rel.*

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on that basis. *Id.* at 1139 n.18. Clearly that exception is inapplicable here.

In *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996), we suggested that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is alcohol- or drug-related. *See id.* at 906 ("Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability."). Again, clearly that exception is inapplicable here.

[4] The County does appear to argue that Dark's misconduct, if not resulting from his disability, stemmed from his failure to take proper precautions in light of his disability. But an employer could just as easily say that excessive absenteeism was caused by an employee's failure to arrive at work regardless of his migraine headaches, *see Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 875 (9th Cir. 1990), or regardless of his obsessive compulsive disorder, *see Humphrey*, 239 F.3d at 1140. Thus, we think that the case law does not sustain this distinction.

Baird v. Rose, 192 F.3d 462, 469 (4th Cir. 1999); *Foster v. Arthur Andersen, LLP,* 168 F.3d 1029, 1033-34 (7th Cir. 1999); *McNely v. Ocala Star-Banner Corp.,* 99 F.3d 1068, 1076 (11th Cir. 1996). Rather, "the ADA outlaws adverse employment decisions motivated, *even in part,* by animus based on a plaintiff's disability or request for an accommodation – *a motivating factor standard.*" *Head,* 413 F.3d at 1065 (emphases added).

Causation is a factual inquiry, and we are satisfied that there is record evidence sufficient that a jury could reasonably find that Dark was terminated for an impermissible reason. In addition to the April 17, 2002, termination letter, we consider relevant the documentation Dark provided, in an affidavit dated September 6, 2004, of six separate accidents for which other Road Department workers went undisciplined. *See Collings,* 63 F.3d at 834. Such evidence gives rise to a genuine issue of material fact as to whether Dark's disability was a motivating factor for his termination.

4

Even if the County had cleared each of the foregoing hurdles, summary judgment is also inappropriate if Dark has shown, by "specific, substantial evidence," that the Board's explanation was mere pretext. *See id.* at 834. Dark must have availed himself of

> "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. [He] may succeed in this either directly by persuading the court that a discriminatory

> reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Snead, 237 F.3d at 1093-94 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981)).

The summary judgment record is replete with evidence suggesting that "misconduct" was a pretext for discrimination on the basis of disability. First, Dark was not immediately terminated after the January 15, 2002, accident, but rather was subjected to a medical examination to determine his fitness for the position. The report generated was entitled, "Fitness to Work Evaluation Report." As Dark aptly stated, the County "did not need a doctor's opinion to assess whether Plaintiff had engaged in misconduct." The record also provides direct evidence of the County's motivation for seeking this examination. The April 17, 2002, termination letter stated, "Following your on the job seizure on 1/15/02, the County had sufficient *concerns regarding your medical condition* to request an independent Neurologist to evaluate you." (Emphasis added.)

Second, the documents explaining Dark's termination support an argument for pretext. The letter placing Dark on administrative leave indicates that the County was concerned more with Dark's general condition than the incident of January 15, 2002:

> As you can see, [Dr. Melson] has concluded that you cannot perform the essential functions and duties of your position of Maintenance and Construction Worker III. . . . In addition, allowing you to continue working in your current job for Curry County could impose a direct threat to the

> safety and lives of your fellow employees and other members of the public.

As already discussed, the termination letter also constitutes substantial evidence suggesting that the "misconduct" rationale is pretext. In addition, the County itself added to the summary judgment record other direct evidence of disability discrimination. In Roadmaster Crumley's affidavit of August 10, 2004, he states:

> A Maintenance and Construction Worker III spends approximately 65% of his time operating and driving heavy equipment. . . . The potential for harm is significant *if the worker suffers a seizure* while operating heavy machinery on public roads. Not only *could* the plaintiff himself be hurt by an accident, but also his coworkers or the public *could* be injured, even killed, *if the plaintiff had a seizure* while driving a truck or heavy machinery.

(Emphases added.) Crumley's statements are forward-looking; they exhibit a concern with Dark's future ability, given his epileptic condition, to perform safely the essential functions of his job. Given the ADA's standard of causation and a plaintiff's opportunity to show pretext, it is clear that a rationale developed ex post by a reviewing body cannot wipe away the original discriminatory justification for an employee's termination. *See, e.g., Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 569 (9th Cir. 2004) ("From the fact that [the employer] has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual." (citations omitted)).

Third, Dark's showing of pretext is bolstered by comparative evidence. As already noted, the record includes documentation of similar accidents for which other workers went undisciplined. In response, the County lists several prior incidents in which *Dark* was involved but was not disciplined. Its point, we gather, is that Dark was treated no differently than other employees – the County apparently foregoes discipline for most accidents. And yet in the same breath, in its brief the County unwittingly explains how a reasonable jury could conclude that this evidence actually cuts in Dark's favor:

> The accidents involving other employees were not seizure-related, and did not give rise to conclusions that the employees were unfit for duty. Similarly, the plaintiff's prior accidents did not result in discipline. It was not until an accident occurred that was caused by a *seizure,* that the plaintiff's fitness for duty was called into question.

In other words, the County concedes that this accident was special because it involved Dark's disability.

For all of the foregoing reasons, we must conclude that the County's evidence of a legitimate, nondiscriminatory motive does not, standing alone, entitle it to summary judgment.

B

Dark next contends that there is a genuine issue of fact as to whether he was qualified.

The ADA defines a "qualified individual" as an individual "with a disability who, *with or without reasonable accommodation,* can perform the essential functions of the

employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). Dark bears the burden of proving that he is "qualified." *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 892 (9th Cir. 2001). We must consider whether Dark can perform the job's essential functions without reasonable accommodation, and then, if he cannot, whether he can do so with reasonable accommodation. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231 (9th Cir. 2003).

1

The term "essential functions" refers to the "fundamental job duties of the employment position the individual with a disability holds or desires." It does not "include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). A job function may be considered "essential" for various reasons. *See id.* § 1630.2(n)(2)(i)-(iii). The statute provides that "consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(n)(3) (requiring consideration of the amount of time spent performing the function).

Here, the County, in a September 1995 document entitled "Job Description," lists the "essential duties" of Dark's position as follows:

> Operates grader, dozer, excavator, asphalt distributor, chip spreader, 18-wheel self-loading low boy and ditchmaster.

> Operates dump trucks, front-wheel loaders, brush cutters, rollers, backhoe, water tankers and truck mounted snow plows.
>
> Performs minor blasting for road maintenance projects. Includes blasting rocks and opening plugged culverts.
>
> Performs manual labor associated with building fences, cleaning culverts, traffic control, pot hole patching, bridge repair, tree trimming, brush cuffing, etc.
>
> Maintains equipment by lubricating and making minor repairs.
>
> Trains employees in lower classifications in the operation of heavy equipment.

The document also states that one of the aspects that "distinguishe[s the position] from lower classifications . . . [is] the emphasis on the operation of heavy equipment." This is valid evidence of the essential functions of Dark's position with the Road Department.

To prove Dark is unqualified, the County points to the various heavy machines and vehicles that Dark would be required to operate and around which he would be required to work. It contends that an employee in Dark's former position would spend approximately 65% of his time operating such heavy equipment.

Dark does not contest the County's judgment that the operation of heavy machinery is an essential function of the position. Instead, Dark insists that he is indeed qualified to perform such function. He points out that he has suffered only one on-the-job epileptic episode during more than 16 years with the Road Department. Moreover,

he says, it was only a change in his medication that caused the January 15, 2002, seizure, and two physicians now recommend that Dark return to work "with minimal or no restrictions." Dark, in sum, rejects Dr. Melson's findings and claims that his seizures are "again under control."

Had Dark's treating physicians opined that Dark was fit to operate heavy machinery at the time of his firing, this perhaps would have given rise to a genuine issue of material fact as to his qualifications *without reasonable accommodation*. *See, e.g., Fredenburg v. Contra Costa County Dept. of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999). But the physicians actually recommended Dark's return to work following a period of observation during which he could adjust to the change in his medication. Dark provides no evidence that his seizures were under control at the time of his termination.

2

Such dearth of evidence leads to the question of whether Dark was qualified with reasonable accommodation. The ADA's definition of discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A); *accord Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1252 (9th Cir. 2001).[5]

[5] The County does not argue on appeal that any of the accommodations proposed by Dark would have presented an undue hardship to its business.

a

Dark has the burden of showing the existence of a reasonable accommodation that would have enabled him to perform the essential functions of an available job. *See Zukle v. Regents of University of California,* 166 F.3d 1041, 1046 (9th Cir. 1999) (citation omitted). To avoid summary judgment, however, Dark "need only show that an 'accommodation' *seems reasonable on its face,* i.e., ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 401-02 (2002) (emphasis added).

In addition, our cases make clear that the County bore an affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation that would permit Dark to retain his employment. *See Allen v. Pacific Bell,* 348 F.3d 1113, 1115 (9th Cir. 2003) (per curiam) (citing *Humphrey,* 239 F.3d at 1137-39); *Morton,* 272 F.3d at 1256 (explaining that summary judgement is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith); *Nunes,* 164 F.3d at 1248-49 (reversing summary judgment because, *inter alia,* "the record contains no evidence that [the employer] considered any at-work accommodations to reduce the risks it feared" (citation omitted)); *see also* 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."). Because the County did not engage in any such process, summary judgment is available only if a reasonable finder of fact *must* conclude that "there would in any event have been no reasonable accommodation available." *Morton,* 272 F.3d at 1256 (citation omitted).

b

Here, the record indicates that Dark requested accommodation through either (1) a temporary change in his duties; (2) reassignment to a new position; or (3) the use of accumulated sick leave or medical leave without pay.

Dark's accommodation proposals are based on his argument that his uncontrolled epilepsy was temporary. Dark argues – with the concurrence of his treating physicians – that he could safely resume all functions of his job upon completing the transition to his new medication. Though Dr. Melson, the County's physician, doubted Dark's overall fitness, he also acknowledged the relevance of Dark's "medication adjustments." At the least, Dark has raised a genuine issue of material fact as to his qualifications post-adjustment. In this light, we consider whether a reasonable juror could find that any of the accommodations proposed by Dark were reasonable and available.

i

Regulations under the ADA provide that "job restructuring" may be a "reasonable accommodation" required of the employer. 29 C.F.R. § 1630.2(o)(2)(ii). Dark argues that the transport of heavy machinery consumed only two to three percent of Dark's work time, and thus there is a genuine issue of fact as to whether this was an essential function. For the 40 days during which Dark's commercial driver's license was suspended, he argues, this function could have been reallocated to another employee. The County, however, considers this argument a red herring; whether Dark should be made to drive on the public roads is beside the point when the job's essential function is the

operation of heavy equipment, occupying 65% of total work time.

The ADA does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees. *See* 29 C.F.R. Part 1630, App. ("An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions."); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001). The County thus need not restructure Dark's position by exempting him from the essential duty of operating heavy machinery. Dark has not shown job restructuring was an available option.

ii

Then there is the possibility of reassignment. Dark is a qualified individual under the ADA if he can "perform the essential functions of a reassignment position, with or without reasonable accommodation, even if [he] cannot perform the essential functions of the current position." *Hutton*, 273 F.3d at 892; *see also* 42 U.S.C. § 12111(9) (noting that reasonable accommodation may include reassignment to a vacant position).

As noted, Dark offered the possibility of "[r]eassignment to a vacant position, either temporary or permanent," and alleges that the "evidence shows [that] there were a number of open positions for which [he] was qualified around the time of his discharge."[6] The County does not

[6] Dark suggests he could have been reassigned to "weed control, flagging, clerical, mechanic, data entry, reception, surveyor assistant, building maintenance, and sign making." As to Dark's qualifications for these positions, the record indicates that his only limitation pertained

(Continued on following page)

reject the possibility of reassignment, but merely points out that the affidavit serving as Dark's evidence for the availability of reassignment states only that certain positions "have become available" since his termination, not that they were available *at that time*.

Dark's response is to cite two Tenth Circuit cases, *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), and *Boykin v. ATC/Vancom of Colorado, L.P.*, 247 F.3d 1061 (10th Cir. 2001). These cases hold that vacant positions to which a disabled employee may be reassigned include those "that the employer reasonably anticipates will become vacant in the fairly immediate future." *Midland Brake,* 180 F.3d at 1175 (citation omitted).

The proposition Dark advances is consistent with our previous holding that "the duty to accommodate is a continuing duty that is not exhausted by one effort." *Humphrey,* 239 F.3d at 1138. It is also contemplated within the EEOC guidelines. *See* 29 C.F.R. Part 1630, App. (advising that reassignment is reasonable "if the position is vacant within a reasonable amount of time," which "should be determined in light of the totality of the circumstances"). We adopt the Tenth Circuit's rule: in considering reassignment as a reasonable accommodation, an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period. Therefore, we conclude that there is a genuine issue of material fact as to whether

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to the possibility of injury should he become unconscious. Save flagging, there is no such danger inherent in any of the proposed reassignments.

Dark could have been accommodated through reassignment.[7]

iii

Finally, Dark argues that the County could have reasonably accommodated his disability by allowing his use of accumulated sick leave or unpaid medical leave. He claims to have offered the use of his 712 hours (89 days) of accumulated sick leave "until the seizure issue could be resolved" by the adjustment of his medication levels. On appeal, the County's response is simply to assert that the ADA does not require their agreement to this proposal.

In *Nunes,* we held that"[u]npaid medical leave may be a reasonable accommodation under the ADA. . . . Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." 164 F.3d at 1247; *see also* 29 C.F.R. Part 1630, App. (stating that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"); *Humphrey,* 239 F.3d at 1135-36 (holding that an employee need not show that the

[7] Dark does not specify when these jobs became available, except that they became available since his termination – sometime between April 17, 2002, and September 6, 2004 (the date of his affidavit). In at least one prior case, we have not required any greater specificity. *See McGregor v. Nat'l R.R. Passenger Corp.,* 187 F.3d 1113, 1115 (9th Cir. 1999) ("But Amtrak's own expert stated that in 1995 and 1996 there were twelve 'appropriate openings' for which McGregor was qualified despite her disability.").

proposed medical leave is "certain or even likely to be successful" (citing *Kimbro,* 889 F.2d at 879)).[8]

Although recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and cannot state when and under what conditions he could return to work at all), *see Taylor v. Pepsi-Cola Co.,* 196 F.3d 1106 (10th Cir. 1999), the County was obligated to consider this option under the particular circumstances of Dark's case. As such, there remains a genuine issue of material fact as to whether Dark could reasonably have been accommodated by his request for leave sufficient to permit his transition to new medication.[9]

---

[8] The facts of *Nunes* are a significant parallel to those here: an otherwise satisfactory employee suffered fainting spells on the job, and the employee sought a leave of absence in order to gain control over the condition by learning stress reduction techniques to control her symptoms. *See* 164 F.3d at 1245-47; *see also Kimbro,* 889 F.2d at 879 (holding that an employee who suffered from migraine episodes was justified in requesting a temporary leave of absence as an accommodation for his disability where the leave would have allowed his doctor to formulate an effective treatment).

[9] The County objects to this entire line of analysis, arguing that accommodation of Dark would be *per se* unreasonable. It argues that "[i]f an employee does not control his disability and fails to meet the employer's legitimate job expectations, the employer may lawfully terminate the employee's employment." For this proposition, the County cites *Siefken v. Village of Arlington Heights,* 65 F.3d 664 (7th Cir. 1995), in which a municipality permissibly terminated a police officer's employment because he failed to control his diabetes, and *Hill v. Kansas City Area Transp. Auth.,* 181 F.3d 891 (8th Cir. 1999), in which a municipality fired a bus driver who fell asleep twice on the job due to a combination of medications she was taking to control hypertension.

We think that those cases are distinguishable. Hill requested, as an accommodation, "a drug screening that would have identified a

(Continued on following page)

3

We are satisfied that there remains a genuine issue of material fact as to whether Dark was qualified with reasonable accommodation.

C

Finally, Dark contends that there is a genuine issue of material fact as to whether he poses a "direct threat" to the safety of others. Under the ADA, an employer is entitled to defend the adverse employment action on the ground that "an individual [poses] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

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combination of pain and hypertension medications that would not cause drowsiness." The court considered this request unreasonable because it "was not within her employer's control. . . . [The employer] controlled Hill's work conditions, but it was not her doctor or pharmacist." *Id.* Dark, in contrast, requests accommodations that are very much within the County's control, *e.g.*, reassignment or medical leave. In the same vein, Dark, unlike Siefken, actually needs an accommodation and requests a change in the ordinary terms and conditions of his work – not simply a "second chance" to change his own behavior. *See* 65 F.3d at 666-67. Moreover, Dark, unlike Hill, did not "ignore[ ] the problem until [his] work performance warranted discharge." Hill had repeated work attendance problems due to her oversleeping and was twice found asleep on her bus. *Id.* at 893. Dark simply encountered a single work-related episode due to a temporary change in his medication.

In any case, *Nunes* demonstrates that our court has not taken an approach as unforgiving as that exhibited in these cases from the Seventh and Eight Circuits. *See* 164 F.3d at 1245-47; *see also Humphrey*, 239 F.3d at 1137 ("It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated."). We therefore reject the County's argument.

For purposes of this summary judgment motion, it matters not whether we consider the County's asserted defense under the rubric of "direct threat" or "business necessity." *See generally Morton,* 272 F.3d at 1258-61 (citations omitted) (distinguishing the two defenses and explaining the scope of each). We need only point out that both defenses incorporate a requirement that the qualification standards be incapable of modification through a reasonable accommodation that would permit the disabled employee to meet those standards. *See* 42 U.S.C. § 12113(a); *Morton,* 272 F.3d at 1262-63; *Hutton,* 273 F.3d at 893.

Thus, we must conclude that the County's defense suffers from the very same defect that foreclosed summary judgment on the "qualified individual" issue. *See supra* Part II.B. As we have already determined, there remains a genuine question of material fact as to whether a reasonable accommodation – such as temporary reassignment or the use of medical leave – could have eliminated the need for application of the "seizure-free" requirement resulting in Dark's termination. The County has not met its burden and is therefore not entitled to the defense on summary judgment.

III

Whatever the ultimate success of Dark's ADA claim on the merits, we conclude that he is entitled to a jury trial and that the County is not entitled to summary judgment.

REVERSED and REMANDED.

2004 WL 2468356

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT DARK,

Plaintiff,

vs.

CURRY COUNTY
and CURRY COUNTY
ROAD DEPARTMENT,
DAN CRUMLEY, individually
and in his official capacity as
Curry County Roadmaster,

Defendants.

Civil No. 03-3041-CO
OPINION AND ORDER

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AIKEN, Judge:

Magistrate Judge Cooney filed his Findings and Recommendation on September 9, 2004. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed.R.Civ.P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that

portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Business Machines,* 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied,* 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given the file of this case a *de novo* review. I ADOPT the Magistrate's Findings and Recommendation (doc. 29). Defendants' motion for summary judgment (doc. 24) is granted and this case is dismissed.

PROCEDURAL HISTORY

Defendants filed their summary judgment motion on August 17, 2004. Plaintiff's response was due on August 31, 2004. On September 9, 2004, Magistrate Cooney entered his Findings and Recommendation granting defendants' summary judgment motion. On September 10, 2004, plaintiff filed a response in opposition to defendants' summary judgment motion. The Magistrate elected to treat plaintiff's response in opposition to defendants' summary judgment motion as Objections to the Findings and Recommendation and referred the matter to this court. The Magistrate also referred plaintiff's motion for reconsideration of the Findings and Recommendation to this court.

DISCUSSION

This court reviewed, *de novo,* the entire record before this court, including the plaintiff's opposition to defendants' summary judgment motion, exhibits and affidavits, and defendants' reply memorandum. Both plaintiff's opposition and defendants' reply memorandum were not

previously considered by Magistrate Cooney prior to drafting his Findings and Recommendation.

Even if this court assumes that plaintiff established a prima facie case of discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12131, the burden then switches back to the defendant to articulate a legitimate, nondiscriminatory reason for taking the adverse employment action. *Snead v. Metropolitan Property & Casualty Insurance Co.,* 237 F.3d 1080, 1087 (9th Cir.), *cert. denied,* 534 U.S. 888 (2001). The defendant met that burden with its undisputed evidence that plaintiff was discharged because he reported to work and operated heavy equipment despite having experienced an "aura" warning him that he was going to have an epileptic seizure thereby placing himself, his co-workers, and the public at substantial risk for harm. In discharging plaintiff, the Curry County Board of Commissioners concluded that plaintiff acted irresponsibly, recklessly, and with total disregard for the safety to himself, other employees and members of the public by driving a piece of heavy equipment when he knew he was going to have a seizure.

At this point the burden returns to the plaintiff to show that the explanation for his discharge was a pretext for disability discrimination. *Snead,* 237 F.3d at 1093. To avoid summary judgment, the plaintiff must produce specific, substantial evidence of pretext. *Collings v. Longview Fibre Co.,* 63 F.3d 828, 834 (9th Cir. 1995). After a thorough examination of the record, I find that plaintiff has failed to offer any evidence to show that defendant's reason for termination was a pretext for discrimination. Instead, the record shows that plaintiff was terminated due to his judgment to drive machinery on the job when he knew he was in danger of experiencing an epileptic

seizure; and he did, in fact, have a seizure rendering him unconscious while driving. Therefore, I affirm Magistrate Cooney's Findings and Recommendation and rule that defendants are entitled to summary judgment.

CONCLUSION

The Magistrate's Findings and Recommendation (doc. 29) is ADOPTED and defendants' motion for summary judgment (doc. 24) is granted. Further, plaintiff's motion for reconsideration of the objections (doc. 39) is granted. This court did consider plaintiff's objections to the Findings and Recommendations, as well as plaintiff's response in opposition to defendants' summary judgment motion. This case is dismissed, and all pending motions are denied as moot.

IT IS SO ORDERED.

Dated this 2 day of November 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT DARK,

Plaintiff,

v.

CURRY COUNTY
and CURRY COUNTY
ROAD DEPARTMENT,
DAN CRUMLEY, individually
and in his official capacity as
Curry County Roadmaster,

Defendants.

Civil No. 03-3041-CO

JUDGMENT

This action is dismissed.

Dated: November 2, 2004.

Donald M. Cinnamond, Clerk

by: /s/ Leslie Engdall
Leslie Engdall, Deputy

JUDGMENT **DOCUMENT NO: ___**

2004 WL 2009407

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT DARK,

Plaintiff,

v.

CURRY COUNTY, et al.,

Defendants.

Civil No. 03-3041-CO
FINDINGS AND
RECOMMENDATION

COONEY, Magistrate Judge:

Plaintiff brings this action against defendants Curry County, Curry County Road Department, and Dan Crumley alleging claims for disability discrimination in violation the Americans with Disabilities Act, 42 U.S.C. 12131 and ORS Chapter 659A.100 *et* seq.. Plaintiff seeks economic, non-economic, and punitive damages, declaratory and injunctive relief, costs, expenses, and attorney's fees. Defendants move for summary judgment (#25). Plaintiff did not file a response.

I. FACTS

Defendants submit the following unopposed statement of facts:

1. On March 4, 1985, Robert Dark began his employment with the Curry County Road Department in the position of Right of Way Maintenance/Weed Control. (Affidavit of Crumley).

2. Mr. Dark has Epilepsy, and has a history of disabling grand mal seizures. (Exhibit 101). He tries to control his Epilepsy by taking medication. Before he is going to have a seizure, he always has a warning, which he refers to as an "aura." (Exhibit 102 at 5). All his seizures are preceded by auras. (Exhibit 102 at 11).

3. On January 15, 2002, in the morning and prior to going to work, Mr. Dark had an aura. (Exhibit 102 at 34). Mr. Dark did not inform anyone at work that he had the aura. Later that morning at work, and while driving a County vehicle with a passenger, Mr. Dark had a seizure and became unconscious behind the steering wheel. As described by Mr. Dark in his deposition:

> A. I got up that morning. I had an aura at that time. I would not generally have went to work. I did. My job that day was short-handed. My job that day was roller.
>
> And midmorning at breaktime, 9:00, 10:00 o'clock, I knew I didn't feel good, and at that time there was a man flagging. I knew he was capable of running the roller so I asked him to trade with me just as a safety precaution, and we did.
>
> We had-the truck that he was using, the small truck that he was using to flag with, we had to move it about a couple hundred yards up the road, and it would be there for the rest-for the rest of the day flagging. And I moved it up with him riding in it, and that's when I had the seizure.
>
> Q. What happened after you had the seizure or while your were having the seizure?
>
> A. I am unconscious.

Q. Okay. You were driving the truck then?

A. Yes.

(Exhibit 102 at 34-35).

4. On January 15, 2002, the incident was reported to Dan Crumley, the Curry County Roadmaster. Mr. Crumley had the people involved provide written statements to him. He also conducted interviews of those involved. After reviewing the statements and conducting the interviews, Mr. Crumley concluded that had the passenger in the truck, Steve Brewer, not grabbed the steering wheel of the truck, a very serious accident would have occurred. (Affidavit of Crumley).

5. As of January 15, 2002, Mr. Dark's job with Curry County was Maintenance and Construction Worker III. The Curry County Road Department's description for the position of Maintenance and Construction Worker III lists the "essential duties and responsibilities" of the position. (Exhibit 104). These duties include the ability to (1) operate a "grader, dozer, excavator, asphalt distributor, chip spreader, 18-wheel self-loading low boy, and ditchmaster;" (2) the ability to operate "dump trucks, front-wheel loaders, brush cutters, rollers, backhoe, water tankers and truck mounted snow plows;" (3) and the performance of "minor blasting for road maintenance projects," including "blasting rocks and opening plugged culverts."

6. Concerned about the danger of allowing Mr. Dark to operate on or near machinery that could harm himself, his coworkers, or the public, and concerned that Mr. Dark could not safely perform the essential functions and duties of his job, Mr. Crumley requested Mr. Dark to submit to a

medical examination by Dr. John Melson, a neurologist. (Affidavit of Crumley).

7. On February 20, 2002, Mr. Dark told Mr. Crumley that he had surrendered his Commercial Driver's License (CDL) to the Department of Motor Vehicles. Mr. Dark told Mr. Crumley that he was advised by the DMV that the law required him to tell his employer that his CDL was suspended. (Affidavit of Crumley).

8. On March 11, 2002, Mr. Dark was examined by Dr. Melson. On March 15, 2002, Mr. Crumley received Dr. Melson's report. Dr. Melson concluded that Mr. Dark could not safely perform all of the essential functions and duties of his job with the County. (Affidavit of Crumley; Affidavit of Crumley Exhibit 105).

9. On March 18, 2002, Mr. Crumley advised Mr. Dark by letter that he was being placed on administrative leave with pay pending a hearing on April 1, 2002, to determine whether Mr. Dark's employment should be terminated. (Exhibit 106).

10. On April 1, 2002, Mr. Crumley held a hearing to determine whether to terminate Mr. Dark's employment. At the hearing, Mr. Dark was represented by his attorney, Manuel Hernandez. At the hearing, Mr. Dark admitted that on the morning of January 15, 2002, he had an "aura" warning him of a seizure prior to driving the one-ton truck. He told Mr. Crumley at the hearing that he can always tell, usually at least an hour ahead of time, that he could have a seizure. Mr. Dark told Mr. Crumley that even though he had the "aura," he decided to drive any way. (Affidavit of Crumley).

11. On April 17, 2002, Mr. Dark was notified by letter that his employment was terminated, because he could not safely perform the essential functions and duties of his job and for driving after he had the aura. (Exhibit 107).

12. On April 26, 2002, the plaintiff appealed Mr. Crumley's decision to the Curry County Board of Commissioners. (Exhibit 108).

13. On June 26, 2002, the Curry County Board of Commissioners affirmed the decision, finding as follows:

> III. Conclusions of Law
>
> 1. Mr. Dark acted irresponsibly and recklessly on January 15, 2002, because he operated a truck and heavy equipment after experiencing an aura.
>
> 2. By operating the truck and heavy equipment on January 15, 2002, Mr. Dark knowingly put the safety of himself, co-workers and the general public in jeopardy.
>
> NOW, THEREFORE, IT IS HEREBY ORDERED that Dan Crumley's decision to terminate the employment of Robert Dark is hereby affirmed for the reason that on January 15, 2002, Robert Dark acted irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public in operating a motor vehicle on a public road while on duty and with another employee of the County in the vehicle, knowing that he had a warning of a seizure which would render him unable to operate the motor vehicle.

(Exhibit 109).

14. On November 4, 2002, Mr. Dark filed a complaint with the Bureau of Labor and Industries for the State of

Oregon. (Exhibit 110). On February 7, 2003, the complaint was dismissed, because "The Division did not find sufficient evidence to continue" the investigation. (Exhibit 110 at 4).

15. On November 25, 2002, Mr. Dark filed a complaint with the Equal Employment Opportunity Commission under the Americans with Disabilities Act. (Exhibit 111). On March 11, 2003, the Director dismissed the complaint because "I have determined that the evidence obtained during the investigation does not establish a violation of the statute." (Exhibit 111 at 4).

16. On June 2, 2003, while working for a building contractor, Mr. Dark once again ignored an aura that he experienced in the morning before going to work, and ended up having a seizure on the top of a roof of a house he was working on as a carpenter. Again, Mr. Dark did not inform his employer that he had the aura and could possible have a seizure while working on the roof. (Exhibit 101 at 1 and Exhibit 102 at 19-21).

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1409 (9th Cir.), *cert. denied,* 502 U.S. 994 (1991). In deciding a motion for summary judgment, the court must determine, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. American*

Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994) (citations omitted). The parties bear the burden of identifying the evidence that will facilitate the court's assessment. *Id.*

The moving party bears the initial burden of proof. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.* "[T]he moving party . . . need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case." *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393 (4th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995) (citation omitted).

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. *Id.*

If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. *Id.*

III. DISCUSSION

Defendants move for summary judgment arguing that: 1) plaintiff's employment was terminated because of plaintiff's misconduct; and 2) plaintiff is not a qualified individual with a disability – a) plaintiff cannot perform the essential functions of his position because of his uncontrolled seizures and lack of a valid commercial drivers' license; and b) plaintiff was a threat to the safety of himself, co-workers, and the public because of his uncontrolled seizures.

The ADA seeks to eliminate employment discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). It prohibits covered entities from discriminating against "a qualified individual with a disability because of the disability . . . with regard to . . . discharge of employees. 42 U.S.C. § 12112(a). Only those individuals who are disabled and are qualified are entitled to relief. *See School Board of Nassau County, Fla. v. Arline,* 480 U.S. 273, 285 (1987).

The provisions of Oregon's Discrimination Against Disabled Persons in Employment Act (Oregon Act) are modeled after the ADA and contain language which is significantly similar to the ADA. *Wheeler v. Marathon Printing, Inc.,* 157 Or.App. 290, 301 fn. 6 (1998). The Oregon Act provides that "ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended." ORS 659A.139. "The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law." *Snead v. Metropolitan Property &*

Casualty Insurance Co., 237 F.3d 1080, 1087 (9th Cir.), *cert. denied*, 534 U.S. 888 (2001).

To establish a prima facie case of discrimination in violation of the ADA, plaintiff must prove: 1) that he is a qualified individual with a disability; 2) that he has suffered an adverse employment action; and 3) that a causal connection exists between the adverse employment action and the disability. *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 891 (9th Cir. 2001). A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that individual holds or desires. 42 U.S.C. § 12111(8).

The determination of whether an individual with a disability is qualified should be made at the time of the employment decision. *Taylor v. Garrett*, 820 F.Supp. 933 (E.D. Penn. 1993). To be qualified, the individual must satisfy the prerequisites for the position which could include possessing the appropriate educational background, employment experience, training, skills.... 29 C.F.R. § 1630.2(m).

Essential functions means the fundamental job duties of the employment position. 29 C.F.R. § 1630.2(n)(1). A job function may be considered essential for several reasons, including but not limited to the following: the position exists to perform that function; there are a limited number of employees among whom the performance of that job function can be distributed; or the function is highly specialized so that the employee is hired for his expertise or ability to perform that particular function. 29 C.F.R.

§ 1620.2(n)(2)(i)(ii)(iii). Evidence that a function is essential includes: the employer's judgment of what functions are essential; a written job description; the amount of time spent performing the function; consequences of not requiring the employee to perform that function; terms of a collective bargaining agreement; work experience of past employees in the position; and/or the current work experience of the employee. 29 C.F.R. § 1620.2(n)(3)(i-vii). Plaintiff has the burden to establish that he is "disabled" and "qualified" to perform the essential functions of the job either with or without reasonable accommodation. *See Hutton,* 273 F.3d at 892.

Defendants have presented undisputed evidence that the essential functions of plaintiff's position as Maintenance and Construction Worker III required plaintiff to operate heavy equipment about 65% of the time, work around heavy equipment, and maintain alertness while on the job. This position requires the possession of a commercial driver's license, which plaintiff no longer possessed after the incident in which he had a seizure while operating a County vehicle. Dr. Melson concluded that plaintiff's seizures were uncontrolled by medication and because of this plaintiff should not work on or near heavy equipment. Based on the undisputed evidence, defendants have established that plaintiff could not perform the essential functions and was not qualified for the position. *See Mathews v. Denver Post,* 263 F.3d 1164, 1169 (10th Cir. 2001).

Once the plaintiff has established that he is disabled and qualified to perform the essential functions of the job, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reasons for taking the adverse employment action. *Snead,* 237 F.3d at 1093.

Plaintiff must then show that the explanation for his discharge was a pretext for disability discrimination. *Id.* To avoid summary judgment, the plaintiff must produce specific, substantial evidence of pretext. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995), *cert. denied*, 516 U.S. 1048 (1996).

Defendants have presented undisputed evidence that plaintiff was discharged because he reported to work and operated heavy equipment despite having received an "aura" warning that he was going to have a seizure, thereby placing himself, his co-workers, and the public at substantial risk of harm. In discharging plaintiff, the County concluded that plaintiff acted irresponsibly, recklessly, and with total disregard for the safety to himself, other employees and members of the public by driving a piece of heavy equipment when he knew he was going to have a seizure. Defendants have presented evidence that they had a legitimate, nondiscriminatory reason for discharging plaintiff. Plaintiff has not articulated any evidence to show that this reason was a pretext. Therefore, defendants are entitled to summary judgment on plaintiff's claims. *See Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995).

Defendants undisputed evidence also establishes that plaintiff was not meeting defendants legitimate job expectations. Therefore, plaintiff's claims fail as a matter of law. *See Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995).

42 U.S.C. § 12113(a) provides, in part, that "[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards . . . used to screen out . . . an individual with a

disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . ." The term "qualification standard" includes the "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A person cannot perform the essential functions of their job if his disability poses a significant safety risk to those around him. *Chiari v. City of League City,* 920 F.2d 311, 316 (5th Cir. 1991) (citations omitted). The defendant would have to provide testimony/evidence of the significant risk. *Id.*

A direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2. This determination is based on an individualized assessment of the individual's present ability to safely perform the essential functional of the position. *Id.* The assessment is based on reasonable medical judgment. *Id.* Factors to be considered include: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. *Id.*

A significant risk of personal injury can disqualify an individual from a job if the employer cannot eliminate the risk through reasonable accommodation. *Chiari,* 920 F.2d at 317 (citation omitted). The employer bears the burden of proving that an employee constitutes a direct threat. *Hutton,* 273 F.3d at 893.

Defendants undisputed evidence establishes that plaintiff's uncontrolled seizures and his disregard of warnings when the seizures would occur constitutes a

direct threat to the safety of others. There is a significant risk that plaintiff could have a seizure while operating a piece of heavy equipment and this could result in injury to himself, co-workers, and/or members of the public. This risk would exist for as long as he held the position. The nature and severity of the harm is substantial. The likelihood of the potential harm is great considering it has happened before. The potential harm is also imminent given that plaintiff has been suffering a "flurry" of seizures. The EEOC factors support the conclusion that plaintiff posed a direct threat. Therefore, defendants are entitled to summary judgment on plaintiff's claims. *See Hutton,* 273 F.3d at 894.

IV. RECOMMENDATION

Based on the foregoing, it is recommended that defendants' motion for summary judgment (#25) be granted and this case be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. *The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten days within which to file a response to the objections.* Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or

judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 8 day of September, 2004

/s/
UNITED STATES MAGISTRATE JUDGE

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 5 2007
OFFICE OF THE CLERK

No. 06-492

IN THE
Supreme Court of the United States

CURRY COUNTY; CURRY COUNTY ROAD DEPARTMENT; AND DAN CRUMLEY, individually and in his official capacity as Curry County Roadmaster,

Petitioners,

v.

ROBERT DARK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 2007

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STATEMENT OF THE CASE

The Americans with Disabilities Act (ADA) seeks to end discrimination against people with disabilities in all walks of life, including in employment. 42 U.S.C. § 12101(a)(3), (b)(1). The ADA prohibits an employer from firing an employee who is "a qualified individual with a disability because of the disability." *Id.* § 12112(a). A disability is "a physical or mental impairment that substantially limits one or more of [an individual's] major life activities." *Id.* § 12102(a). A "qualified individual" includes not only an employee who can perform his or her current job as it is presently structured, but also an employee who can be employed with "reasonable accommodation," which may include, among other things, job reassignment, *id.* § 12111(8) (defining "reasonable accommodation"); 29 C.F.R. § 1630.2(o)(3) (same), and use of an employee's accrued leave time so that the employee can obtain "necessary treatment." 29 C.F.R. Part 1630, App. § 1630.2(o).

In this case, the court of appeals found that petitioner Curry County, Oregon was not entitled to summary judgment because there were disputed issues of material fact regarding (i) whether respondent Robert Dark had been discriminated against because of his disability and (ii) whether Curry County failed to provide Mr. Dark with a reasonable accommodation. The County's petition seeking review of those fact-bound issues should be denied.[1]

A. The Relevant Facts

Robert Dark has had epilepsy since he was sixteen years old. Pet. App. 2. He has successfully treated his disability with

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[1]The petitioners are Curry County, Oregon, the Curry County Road Department, and Dan Crumley, the Curry County Roadmaster. For convenience, except where the identity of an individual petitioner is independently significant, petitioners are referred to collectively as "the County."

medication, with the exception of an occasional seizure. *Id.* Mr. Dark usually has an aura before he has a seizure, but not every aura is followed by a seizure. *Id.* When he has an aura, about half of the time a seizure follows on the same day. *Id.*

From March 4, 1985, until the 2002 firing that gave rise to this suit, Mr. Dark had worked for the Curry County Road Department. *Id.* at 31. At the time he was fired, Mr. Dark held the position of Maintenance and Construction Worker III. *Id.* at 33. His job duties included operating trucks and other equipment, minor blasting, manual labor, maintaining equipment, and training lower-level employees to operate heavy equipment. *Id.* at 15-16, 33. Until the incident at issue in this case, Mr. Dark had a record of at least satisfactory job performance and had never had an on-the-job seizure. *Id.* at 3.

On the morning of January 15, 2002, Mr. Dark had an aura. *Id.* at 32. He decided to go to work because the County was "short-handed." *Id.* About midmorning, "as a safety precaution," Mr. Dark asked a man who was flagging to trade tasks with him and take over the roller. *Id.* While they were trading tasks and Mr. Dark was moving a small truck to the place where he would be flagging, he had a seizure. *Id.* The other employee helped bring the truck to "a safe halt." *Id.* at 3.

Dan Crumley, the Curry County Roadmaster, investigated the incident and required Mr. Dark to be examined by a neurologist, Dr. John Melson. *Id.* at 33-34. On March 18, 2002, after receiving Dr. Melson's written evaluation, Mr. Crumley placed Mr. Dark on administrative leave with pay and gave Mr. Dark notice of a hearing regarding his possible termination. *Id.* at 34. On April 1, 2002, Mr. Crumley held the hearing. *Id.*

On April 17, 2002, Mr. Crumley sent Mr. Dark a letter firing Mr. Dark because, in Mr. Crumley's view, Mr. Dark could not perform the essential duties of his job and his

continued employment posed a threat to the safety of others. *Id.* at 35. The effective date of Mr. Dark's termination was the date of the letter. *Id.* at 9. The letter noted Mr. Crumley's "concerns regarding [Mr. Dark's] medical condition" and "accept[ed] Dr. Melson's findings that because of the presence of poorly controlled idiopathic epilepsy, [Mr. Dark] should not work around moving machinery." *Id.* at 7. The letter to Mr. Dark concluded that, "I believe a 'seizure free' condition is critical for workers in your occupation . . . . [Y]our condition in my opinion prevents you from performing your duties . . . . " *Id.* at 7-8. The termination letter advised Mr. Dark to make arrangements to pick up his final paycheck and that he could appeal his firing to the Board of Curry County Commissioners ("the Board"). At the time he was fired, Mr. Dark had accumulated eighty-nine days of sick leave, *id.* at 22, and three weeks of vacation time. Ninth Circuit Excerpts of Record (ER)-65.

Mr. Dark sought reasonable accommodations in two ways. First, he asked Mr. Crumley whether he could use his medical leave and his accrued vacation time to control his condition through adjustment of his medications. *Id.* Second, he sought reassignment to other jobs that had become available with the County and that he could perform despite his disability. ER-65 - ER-66. The County did not respond to either request for an accommodation. *Id.*

Mr. Dark appealed his termination to the Board, which held a hearing on May 22, 2002. On June 26, 2002, the Board affirmed Mr. Crumley's termination. Pet. App. 35. The Board concluded that Mr. Dark had engaged in misconduct because he had operated a vehicle "knowing that he had a warning of a seizure which would render him unable to operate [it]." *Id.*; *see also* ER-21. In addition, the Board made findings of fact, including a finding, based on Dr. Melson's evaluation, that, in

light of his epilepsy, Mr. Dark should not work in high places or around moving machinery. ER-20.

B. Legal Proceedings Below

Mr. Dark sought relief from the federal Equal Employment Opportunity Commission (EEOC), claiming that the County had violated his rights under the ADA. The EEOC declined to sue on Mr. Dark's behalf, but, as required, gave him ninety days to file a private suit. Pet. App. 4.

Mr. Dark then sued in the District Court for the District of Oregon, claiming that the County had violated the ADA and Oregon state anti-discrimination law. The County moved for summary judgment. A magistrate judge recommended granting summary judgment in favor of the County, *id.* at 43, and the district court adopted that recommendation, *id.* at 27.

In a unanimous decision authored by Judge Diarmuid O'Scannlain, the Ninth Circuit reversed and remanded for a trial on the merits, finding that there were disputed issues of material fact that precluded judgment in favor of the County. The bases for the court of appeals' ruling and the County's challenge to that ruling are discussed below.

REASONS FOR DENYING THE WRIT

The petition presents three questions. The first question challenges the Ninth Circuit's holding that Mr. Dark raised genuine issues of material fact as to whether he was terminated by the County on the basis of his disability. The last two questions challenge the Ninth Circuit's holding that Mr. Dark raised genuine issues of material fact as to whether the County provided him a "reasonable accommodation" under the ADA. As we now explain, both rulings were correct and neither is worthy of this Court's review.

A. The Court of Appeals Correctly Held That There Are Disputed Issues Of Material Fact As To Whether Mr. Dark Was Subject To Discrimination Because Of His Disability.

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability . . . ." 42 U.S.C. § 12112(a). The County argues that Mr. Dark is not protected by the ADA because he was terminated for misconduct, not "because of" his disability. It is undisputed that Mr. Dark suffers from a "disability," that is, that his epilepsy is "a physical . . . impairment that substantially limits one or more of [his] major life activities." *Id.* § 12102(a). And it is undisputed that the reasons given by the County, when Mr. Crumley formally terminated Mr. Dark in April 2002, related solely to his disability. *See* ER-30 - ER-31. Nonetheless, the County argues that because the ostensible reason given by the Board of Curry County Commissioners, in affirming Mr. Dark's termination two months later, was misconduct – driving while at risk of a seizure – Mr. Dark's disability was not, as a matter of law, the reason for his discharge. Pet. 8-15. The County is wrong for each of three independent reasons given by the court of appeals.

First, the County is incorrect that the Board is the body that fired Mr. Dark. As the court of appeals explained, Pet. App. 8-9, the County, acting through Dan Crumley, terminated Mr. Dark on April 17, 2002. That date, as the County conceded at oral argument below, was the effective date of the discharge. Pet. App. 9; *see also* ER-32 (Crumley's termination letter stating that "you are hereby dismissed from County service," and advising Mr. Dark to arrange to get his "final paycheck"). The Board had no mandatory role in the firing. Mr. Dark's firing would have occurred without any Board involvement if he had not exercised his optional right of appeal, underscoring

that the firing was effectuated by the County through Mr. Crumley.

Because the County had already terminated Mr. Dark by the time the matter came before the Board, the principal case cited by the County as in conflict with the decision below is inapposite. In *Collins v. New York City Transit Authority*, 305 F.3d 113 (2d Cir. 2002), the plaintiff's "termination occurred . . . only *after* a decision" of an arbitration board, *id.* at 119 (emphasis added); *see id.* at 117 (same), which found that the plaintiff was discharged because he had assaulted his supervisor, not for a discriminatory reason. The other cases cited by the County are similarly irrelevant, as they concern the circumstances under which the discriminatory conduct of a subordinate who lacks decisionmaking authority can be attributed to someone who has such authority and exercises it to an employee's detriment. *See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc). Mr. Crumley did not act as a subordinate here. He was (and is) the County's "Roadmaster," who is the chief executive of the Curry County Road Department. *See* ER-30. He terminated Mr. Dark, and no one disputes that he had the authority to do so.

Second, even if the Board's June 2002 decision were viewed as the County's only legally relevant decision, Mr. Dark raised disputed issues of material fact as to whether the stated basis for the Board's decision – misconduct – was a pretext for disability-based discrimination. To be sure, in its "conclusions of law," the Board's stated rationale was misconduct. *See* ER-21. But the Board's decision also sets forth findings of fact concerning Mr. Dark's disability, and, in particular, Mr. Dark's medical evaluation *after* the incident, ER-20 (¶ 3), which would have been irrelevant if Mr. Dark's misconduct were the sole reason for his termination. Similarly, at the hearing before the

Board, the Commissioners extensively questioned both Mr. Dark and his doctor regarding Mr. Dark's disability, his drug regimen, and his ability to return to work despite his disability. *See* ER-123 - ER-128. That questioning raised a reasonable inference that Mr. Dark's conduct on the day of the incident was not the sole reason for the Board's decision.

Moreover, as Judge O'Scannlain noted, the summary judgment record is "replete" with other evidence that the real reason for the termination was Mr. Dark's disability, Pet. App. 12, and that the Board's subsequent finding of misconduct was pretextual. This evidence included (i) the County's decision to subject Mr. Dark to a medical evaluation, (ii) Mr. Crumley's summary judgment affidavit, sworn to more than two years *after* the firing, which continued to focus on Mr. Dark's future ability to perform his job in light of his disability, Supplemental Excerpts of Record (SER)-1 - SER-3; *see* Pet. App. 13, and (iii) the fact that other, non-disabled employees had engaged in similar on-the-job misconduct but had not been fired (or even disciplined). Pet. App. 14. Thus, even if the Board were considered the entity that fired Mr. Dark, the court of appeals correctly held that there were disputed issues of material fact as to whether the Board's decision was based, at least in part, on Mr. Dark's disability.

Finally, as the court of appeals explained, although a disabled employee's misconduct can be entirely distinct from his disability, "[w]ith a few exceptions," *id.* at 9, such as alcoholism, illegal drug use, and criminal acts, *see id.* at 9-10 & n.3 (citing 42 U.S.C. § 12114(c)(4)), "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." Pet. App. 9 (quoting *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). Because the County concedes, as it must, that the conduct that led to Mr. Dark's firing arose from his epilepsy,

the Board's decision was, as a matter of law, based on Mr. Dark's disability.

For all of these reasons, the court of appeals correctly held that the County was not entitled to summary judgment on the ground that it terminated Mr. Dark solely on the basis of misconduct. Thus, the Court should deny review on that question.

B. Review Should Be Denied On The Reasonable Accommodation Issue.

The court of appeals held, on two independent grounds, that Mr. Dark had raised issues of material fact on the question whether he had been reasonably accommodated by the County. It held, first, that Mr. Dark had presented a jury question on whether he should have been accommodated by reassignment to a vacant position that he could have performed despite his disability. *See* 42 U.S.C. § 12111(9)(B) ("'reasonable accommodation' may include . . . reassignment to a vacant position"). In his summary judgment affidavit, Mr. Dark identified a number of County positions that had become vacant and that, with one exception, he could perform despite his epilepsy. *See* Pet. App. 20 & n.6. The County argued that it was entitled to summary judgment because Mr. Dark's affidavit did not state that the jobs had been available at the time he was fired. *See id.* at 21. Relying on an EEOC interpretive guidance (discussed in more detail below), and case law from the Tenth Circuit, the court of appeals rejected the County's position and held that "in considering reassignment as a reasonable accommodation, an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period." *Id.*

Second, the court of appeals held that there were genuine issues of material fact as to whether Mr. Dark could have been accommodated by allowing him to use his eighty-

nine days of accumulated sick leave to adjust his medications and thereafter continue in his prior position. *Id.* at 22-24. In so holding, the court relied on its own case law and the EEOC's interpretive guidance, which identifies use of accrued or unpaid leave as potential reasonable accommodations. *Id.* at 22.

Recognizing that each holding provides a separate basis to sustain the Ninth Circuit's ruling regarding the County's reasonable accommodation obligation, the County seeks review on both issues. Neither is worthy of review.

1. Reasonable Accommodation By Reassignment To A Vacant Position.

The County claims that there is a split in the circuits on the question whether, in seeking a reasonable accommodation on the basis of reassignment, an employee must show that a vacancy existed at the exact same time that he was terminated. As we now show, no such circuit split exists; in fact, in none of the cases cited by the County was the *timing* of a vacancy at issue.

The County relies principally on *Jackan v. New York State Department of Labor*, 205 F.3d 562 (2d Cir. 2000). *See* Pet. 21-22, 23. *Jackan* stated only that "in order to recover under the ADA . . . for a failure to reasonably accommodate by transfer, a plaintiff bears the burden of establishing that a vacancy existed into which he or she might have been transferred." 205 F.3d at 566. The Second Circuit held that the plaintiff failed to meet this burden because he had not identified a specific vacant job to which he could be reassigned, and had said only that he "believed" a position he had previously held was vacant. *Id.* at 564. (Here, by contrast, the court of appeals found that Mr. Dark met his summary judgment burden by listing specific vacant positions. Pet. App. 20 & n.6.) The issue of *when* a vacancy must exist was simply not at issue in *Jackan*. Indeed, in *Jackan*, all of the interactions between the

employee and the employer as to whether there was a vacancy occurred after the employee returned from an extended medical leave and was seeking re-employment with his employer. 205 F.3d at 564. Thus, neither the parties nor the Second Circuit appears to have contemplated that reasonable accommodation via reassignment extends only to vacancies that exist at the precise moment that the loss of employment occurs.

The other cases cited by the County are similarly inapposite. The Seventh Circuit held in *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595-96 (7th Cir. 1999), that the obligation of reasonable accommodation does not require an employer to displace, or "bump," a current employee to make room for a disabled employee seeking reassignment. The only positions identified by the employee seeking accommodation were ones that were filled, and the case simply did not concern the timing of vacancies. Likewise, *Ozlowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001), did not concern the timing of a vacancy. There, the plaintiff lost the case because the positions he identified for potential reassignment either were not vacant or were positions for which he was not qualified or that he could not physically perform. *Id.* at 840-41.[2] Indeed, the court's reference to "position[s] vacant during the time period in which Ozlowski requested a reasonable accommodation," *id.* at 841, suggests that the availability of a vacancy need not be assessed at one point in time. Similarly, because the court considered deposition evidence regarding whether vacancies existed during the litigation, *id.* at 840 n.1, 841 n.2, the strong implication was that an ADA plaintiff seeking a reassignment would not be required to identify a vacancy that existed when the plaintiff's discharge took place.

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[2]As in *Pond*, the court in *Ozlowski* noted that the right to reasonable accommodation does not extend to ousting a current employee to make room for a disabled employee. 237 F.3d at 841 n.2.

Finally, in *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997), the Third Circuit held only that the employer was not required to accommodate the disabled plaintiff's need for light-duty work, and his desire for permanent employment, by transforming a temporary position into a permanent position. *Id.* at 418-19. The case did not concern the timing of a vacancy, and, again, because the court relied on deposition testimony taken more than two years after the plaintiff's initial loss of employment occurred, the implication of the court's ruling was that a vacancy need not exist at the time of discharge. *Id.* at 417.[3]

Because there is no disagreement among the courts of appeals on the vacancy issue, review should be denied on that issue. Moreover, two additional points underscore that the court of appeals reached the correct result.

First, the petition ignores an EEOC interpretive guidance, upon which the Ninth Circuit relied, that expressly rejects the position taken by the County. Shortly after the ADA's enactment, the EEOC proposed regulations and an

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[3]Two other cases cited by the County are even further afield. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997), did not involve a request for reassignment to another position, whether vacant or not, let alone the timing of a vacancy. And, in *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), the D.C. Circuit held that the plaintiff's collective bargaining agreement did not necessarily bar the plaintiff's reassignment to accommodate his disability and remanded for a determination of whether such a reassignment was an appropriate accommodation under the ADA. *Id.* at 1302-03. In so holding, the court noted that, on remand, the plaintiff would have to show that there existed some vacant position to which he could have been reassigned, and that the employer had a corresponding duty to help the plaintiff find such vacancies "since plaintiffs can hardly be expected to hire detectives to look for vacancies." *Id.* at 1304 n.27. Again, the timing of vacancies was not at issue.

interpretive guidance to implement the statute's employment provisions. 56 Fed. Reg. 8578 (Feb. 28, 1991). Consistent with the statutory definition of "reasonable accommodation," *see* 42 U.S.C. § 12111(9)(B), the EEOC listed "reassignment to a vacant position" as a potential accommodation. 56 Fed. Reg. at 8588 (proposed regulation), 8596 (proposed interpretive guidance). After receiving comments from the public, the EEOC finalized the regulation without change. 56 Fed. Reg. 35726 (July 26, 1991) (codified at 29 C.F.R. § 1630.2(o)(2)(ii) (2006)). However, because "commenters asked the Commission to clarify how long an employer must wait for a vacancy to arise when considering reassignment," *id.* at 35730, in its interpretive guidance, the agency "amended the discussion of reassignment to refer to reassignment to a position that is vacant 'within a reasonable amount of time . . . in light of the totality of the circumstances.'" *Id.*; *see also id.* at 35744 (codified at 29 C.F.R. Part 1630, App. § 1630.2(o)); Pet. App. 21 (quoting guidance).

The Ninth Circuit's ruling is fully consistent with the EEOC's interpretive guidance. Under the guidance, the trier of fact will decide whether Mr. Dark identified a vacant position for which he was qualified "within a reasonable amount of time," taking into account "the totality of the circumstances." In general, such circumstances might include whether the employer made efforts to inform the employee of vacancies, the needs of the employer at the time the vacancy or vacancies arose, and the employee's willingness to accept leave without pay or to use accumulated leave during any period in which no vacancies exist. The latter points seem particularly relevant here, because Mr. Dark had accumulated a significant amount of leave, *see* Pet. App. 22; ER-65 (Dark Aff. ¶¶ 6-7) (eighty-nine days of sick leave; three weeks of vacation time), and had offered to "take time off without pay as long as [he] was working towards returning to work in some capacity with the

County." ER-65 - ER-66. In any event, the point here is not to demonstrate that Mr. Dark has the better of the argument – although we believe he does – but simply to show how the EEOC's "totality of the circumstances" approach would operate in practice.[4]

Second, as the Ninth Circuit explained, Pet. App. 18, unless an accommodation was impossible, the County had a responsibility to engage in an interactive process with Mr. Dark to try to arrive at a reasonable accommodation. *See* 29 C.F.R. § 1630.2(o) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of an accommodation."). Even assuming that the employer is not required to initiate the interactive process, "[o]nce a qualified individual with a disability has requested provision of a reasonable

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[4]With one exception, none of the cases cited by the County even cites, let alone rejects, the EEOC's "totality of the circumstances" approach, further demonstrating that those cases do not address the timing issue. The one exception is *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061 (10th Cir. 2001), which the County apparently believes supports its position. *See* Pet. 22. But that case was relied on by the Ninth Circuit, Pet. App. 21, precisely because it *embraced* the EEOC's guidance and held that "exactly how long an employer should retain an employee on indefinite or medical leave pending the availability of a position that would accommodate the employee's disability . . . must be made on a case-by-case basis." *Boykin*, 247 F.3d at 1065. In *Boykin*, the circumstances included that the plaintiff declined one job vacancy and that the availability of future vacancies was in doubt because the employer was in negotiations with its contractor. *See id.* at 1062, 1065. The result in *Boykin* – that the employer was not required to retain the plaintiff for six months until a desired vacancy occurred – is consistent with the Ninth Circuit's holding that Mr. Dark is entitled to a trial under the "totality of the circumstances" rule. We reiterate that here, unlike in *Boykin*, Mr. Dark was not allowed to use any of his accrued leave, despite his request to do so.

accommodation, the employer *must* make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Part 1630, App. § 1630.9 ("Process of Determining the Appropriate Reasonable Accommodation") (emphasis added). As the EEOC has explained, "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer" and the employee. *Id.*

The ADA's requirement that an employer and employee engage in an interactive process conflicts with the notion that the existence of a job vacancy must, as a matter of law, be determined at only one point in time. If the employer is willing to engage in the required interactive process, the parties should be cognizant of vacant positions that the employee is capable of filling, particularly where, as here, the employee has requested reassignment as a reasonable accommodation. The interactive process necessarily will extend over a period of time. Indeed, as discussed above (at 9-11), in some of the very cases cited by the County, it appears that the availability of vacancies was considered over a significant time period, and that is precisely because the employers in those cases embraced, rather than eschewed, the interactive process. *See, e.g., Ozlowski*, 237 F.3d at 838-40; *Mengine*, 114 F.3d at 419-21; *see also Jackan*, 205 F.3d at 568 n.4; *Stewart*, 117 F.3d at 1283, 1286-87.[5]

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[5]As some of the cases relied on by the County have noted, the employer's participation in the interactive process is particularly important where the employee is seeking reassignment, because the employer is in a better position than the employee to identify vacant positions. *See, e.g., Mengine*, 114 F.3d at 420 ("[W]e do not suggest that the employee has the burden of identifying an open position before the employer's duty of accommodation is triggered. In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer."); *Aka*, 156 F.3d at 1304 n.27.

2. Reasonable Accommodation By Granting Medical Leave.

Mr. Dark also requested a reasonable accommodation from the County to allow him to use his accrued medical leave to adjust his medications and stabilize his condition, and the court of appeals held that there were disputed issues of material fact on that issue. The County does not argue that the court of appeals established a rule of law in conflict with decisions of other courts of appeals (or with any court for that matter). Nor does it (or could it) argue that granting medical leave is an impermissible "reasonable accommodation" under the ADA. *See* 29 C.F.R. Part 1630, App. § 1630.2(o). Instead, the County simply disagrees with the court of appeals' determination that Mr. Dark presented facts precluding summary judgment. *See* Pet. 19 (complaining that the court of appeals "ignored th[e] evidence," and that the County "demonstrated without dispute that the requested medical leave would not have enabled the plaintiff to perform the essential functions of his job"). The fundamental answer to the County's complaint is simple: The question whether the court of appeals erred in evaluating the facts under an agreed legal standard is not the type of question that this Court entertains, absent extraordinary circumstances. *See* S. Ct. Rule 10 (review rarely granted where claimed error is the misapplication of a properly stated rule of law).

In any event, the court of appeals did not err in finding that there were disputed issues of material fact. For starters, it is important to reiterate, as the court of appeals noted, *see* Pet. App. 22, that the County did not engage in an interactive process, but ignored Mr. Dark's request for medical leave. *See* ER-65 (Dark Aff. ¶¶ 6-7); *see also* ER-28 - ER-29 (termination letter). To be sure, the County relied on the evaluation of Dr. Melson, who was hired by the County to examine Mr. Dark about two months after the incident and concluded that Mr. Dark should not return to his prior job. ER-26. The record,

however, contains substantial evidence placing Dr. Melson's conclusion in doubt. First, Mr. Dark maintains that Dr. Melson's evaluation was improperly influenced by a "confidential" letter sent by the County's lawyer to Dr. Melson prior to the medical examination, which presented a one-sided account of Mr. Dark's medical condition and other "circumstantial evidence which may be of assistance to you in making your examination." ER-114. And, yet, even Dr. Melson concluded that Mr. Dark might "return to his usual duty" if "several factors," all of which concerned "medication adjustments," "have been met." ER-26. Moreover, as the court of appeals pointed out, the requested accommodation seemed plausible in Mr. Dark's case, because, in his many years with the County, Mr. Dark experienced only one on-the-job incident related to his epilepsy. Pet. App. 24 n.6. And, finally, contrary to Dr. Melson's evaluation, Mr. Dark's own physicians concluded that, in light of adjustments in his medications shortly after the incident, Mr. Dark was, in fact, able to return to work. ER-123 - ER-127.[6]

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For all of these reasons, review should be denied on the reasonable accommodation issues.

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[6]The County points to evidence that Mr. Dark had a seizure while working for another employer nearly a year and a half after the incident that led to his firing. That evidence is irrelevant to whether, in the aftermath of the incident, the accommodations requested by Mr. Dark were reasonable and should have been considered by the County. In any event, even if this evidence were relevant, it would not negate Mr. Dark's contrary evidence and thus would not undermine the court of appeals' holding that there existed disputed issues of material fact on the reasonable accommodation issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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